IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

HILDA M. GLASSER, as Trustee in Bankruptcy of the Estate of HELEN RUSSELL ROGERS,
Petitioner,

AGAINST

CHARLES FRANCIS ROGERS, HELEN RUSSELL ROGERS and HARRY N. WESSEL,
Respondents.

Brief in Support of Petition for Writ of Certiorari.

Opinions Below.

The opinion of the District Court is reported in 59 F. Supp. 986 (R. 5-10). The opinion of the Circuit Court is reported in 152 F. (2d) 428 (R. 18-21).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered December 10th, 1945 (R. 21). By order of this Court dated March 9th, 1946 the time for filing a petition for certiorari was extended to April 9th, 1946 (R. 23).

Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13th, 1925.

Statement.

A summary statement of the matter involved is set out in the petition and in the interests of brevity is not repeated here.

Summary of Argument.

The Connecticut action was in interpleader. It was brought under a Statute permitting such suits (R. 6). It was in the usual form of that type of action (R. 19). It was so considered by the Connecticut Court (R. 13, 16), by the parties, and by the District Court (R. 6). The Circuit Court seemed to have some doubt as to its nature, but there appears to be no basis for such doubt (R. 19).

An interpleader action is *in personam* as held by *New York Life Insurance Co.* v. *Dunlevy*, 241 U. S. 518 and *Hanna* v. *Stedman*, 230 N. Y. 326. No authority to the contrary was found by the District Court (R. 9). Petitioner being a resident of New York and served by mail in New York, the Connecticut decree is not binding on her. This interpleader action cannot be distinguished from others on the ground taken by the Courts below that there was a *res* in the hands of the plaintiff and under the Court's control because that is true of every interpleader action. Whether an action is *in rem* or *in personam* depends on the nature of the action. A *rem* action requires a *res*, but the existence of a *res* will not make it one *in rem*. The identical *res* that makes a garnishee action one *in rem* under the rule of *Harris* v. *Balk*, 198 U. S. 215 does not make the interpleader action one *in rem*, which was the specific holding in *New York Life Insurance Co.* v. *Dunlevy*, 241 U. S. 518.

Under the doctrine of *res judicata* the Connecticut decree, even if the Court had jurisdiction over the person, would not be *res judicata* of the issues here involved because the causes of action are different and the decree is limited to the precise point determined and the Connecticut Court made no attempt to determine the issues involved in this suit.

The petitioner was given three days' notice within which to present and prove her claim in the interpleader suit and as proof of her claim required depositions and production of testimony and evidence from New York, she was not afforded an opportunity of being heard (R. 16).

When petitioner applied to the Connecticut Court for a continuance, or, in the alternative, that the decree direct payment of the fund to the assignee and leave open the issues involved in the action in the District Court as to whether the assignment was in fraud of creditors, the respondents' counsel assured the Connecticut Court of the assignee's financial responsibility (R. 14, 15), and the Connecticut Court directed that payment be made to the assignee (R. 7, 8). Respondents are thereby estopped from contending that the decree was intended to and did foreclose the issues in this action.

ARGUMENT.

I.

The Connecticut action was in personam and not binding on petitioner because of lack of service of process on her in Connecticut.

Petitioner was a resident of New York and was served in New York by mail (R. 12). The action instituted by the Hartford-Connecticut Trust Company in the Superior Court in Connecticut was brought under a Statute permitting the institution of an interpleader action (R. 6); it prayed for a judgment requiring the defendants in the

action to interplead (R. 13); the final decree directed the payment and delivery of the property to one of the defendants and discharged the stakeholder from liability (R. 7, 8); the parties considered the action as one of interpleader and so did the District Court.

Interpleader is *in personam* and there seems to be no authority to the contrary. *New York Life Insurance Company* v. *Dunlevy*, 241 U. S. 518; *Hanna* v. *Stedman*, 230 N. Y. 326.

> "No case has been cited by counsel and I have found none which expressly holds that in an interpleader action involving a *res* or specific fund substituted service may be made."
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> Opinion of Goddard, *J.*, below (R. 9).

Though in the Code States and in the Federal Courts there is only one form of action, actions must still be differentiated one from the other. There are still the same differences as before between an action to quiet title and one of interpleader, for example. No form of test can be phrased to determine which are *in rem* and which are *in personam*. Historically and by precedent certain types of actions are *in rem* and others are *in personam*. Interpleader is in the latter class.

The Courts below laid stress on the fact that the interpleader involved a *res* in the hands of the Connecticut plaintiff and therefore the action was *in rem*. It is submitted that

1. Every interpleader involves a *res* in the hands of the plaintiff and in spite of that is *in personam*, as this Court held in *New York Life Insurance Company* v. *Dunlevy*, 241 U. S. 518.

2. While in a *rem* action there must be a *res*, the existence of a *res* does not make every action involving a

res one *in rem*. This is perfectly illustrated by the *Dunlevy* case where the identical *res* which this Court held gave the Pennsylvania Court jurisdiction *in rem* in an attachment proceeding, did not give it jurisdiction *in rem* in an interpleader suit.

The insurance company in that case became liable for $2,479.70 which was claimed by one Gould in Pennsylvania and by his daughter, Mrs. Dunlevy in California. A creditor of the daughter attached the fund in Pennsylvania. The insurance company asked the Court to interplead Gould and Mrs. Dunlevy and the latter was served in California but did not appear. The insurance company paid the money into Court and after trial it was determined that there was no valid assignment to Mrs. Dunlevy and the fund was therefore paid over to Gould. In an action instituted by Mrs. Dunlevy against the insurance company in California this Court held that the interpleader proceeding was *in personam* and as no service of process on her was made in Pennsylvania, was void.

> "Beyond doubt, without the necessity of further personal service of process upon Mrs. Dunlevy, the Court of Common Pleas at Pittsburgh had ample power through garnishment proceedings to inquire whether she held a valid claim against the insurance company and if found to exist then to condemn and appropriate it so far as necessary to discharge the original judgment. Although herself outside the limits of the State such disposition of the property would have been binding on her. *Chicago, R. I. & P. Ry.* v. *Sturm*, 174 U. S. 710; *Harris* v. *Balk*, 198 U. S. 215, 226, 227; *Louis. & Nash. R.R.* v. *Deer*, 200 U. S. 176; *Balt. & Ohio R.R.* v. *Hostetter*, 240 U. S. 620; Shinn on Attachment and Garnishment, Sec. 707. See *Brigham* v. *Fayerweather*, 140 Massachusetts, 411, 413. But the in-

terpleader initiated by the company was an altogether different matter. This was an attempt to bring about a final and conclusive adjudication of her personal rights, not merely to discover property and apply it to debts."

New York Life Ins. Co. v. *Dunlevy*, 241 U. S. 518, 520, 521.

"There is no authority so far as we are aware holding that an action of interpleader is one *in rem*, but exactly the opposite view has been entertained. (*N. Y. Life Ins. Co.* v. *Dunlevy*, 241 U. S. 518, 521, 522.)"

Hanna v. *Stedman*, 230 N. Y. 326, 335.

The key to the reason that interpleader is *in personam* may be the statement contained in the last two sentences in the quotation from the *Dunlevy* case. Interpleader is a device to relieve a stakeholder from liability but its essence is the determination of the rights of the claimants between themselves. The litigation between the claimants is one to secure an adjudication of their personal rights.

The Federal Interpleader Act was enacted just because interpleader was *in personam* and a stakeholder therefore could not secure an adjudication by State Court interpleader that would protect him when he was unable to acquire personal jurisdiction over a non-resident claimant.

"*New York Life Ins. Co.* v. *Dunlevy* (1916), 241 U. S. 518, exhibited the serious problems encountered by insurance companies when conflicting demands are made by residents of different States. There two individuals, residents of California and Pennsylvania, claimed the surrender value of a life

policy. The insurer unsuccessfully sought through interpleader proceedings in Pennsylvania to secure release from all liability.

In order to mitigate the difficulties, Congress, by the Act of February 27, 1917, 39 Stat. 929, authorized insurance companies to file bills of interpleader in District Courts of the United States. An amendment followed February 25, 1925, 43 Stat. 976, U. S. C. A. 28, S. 41 (26). And the Act of May 8, 1926, 44 Stat. 416, U. S. C. A. 28, Supp., S. 41 (26) (in the margin), rewrote and amplified the provisions of the earlier enactments."

Sanders v. *Armour Fertilizer Works,* 292 U. S. 190, 194.

The case presents no difficulty if precedent is followed, and such difficulty as the District Court found was presented by the case is because of the attempt to reason from analogy in determining the nature of the Connecticut action instead of following the well-established rule that interpleader is *in personam.*

II.

The adjudication in the Connecticut suit was not res judicata of the issues involved here.

The Connecticut decree is not a bar to the prosecution of this action. For the purposes of discussing the application of the doctrine of *res judicata,* we assume that the Connecticut Court had jurisdiction by service of process in Connecticut.

A classic statement of the rule of *res judicata* was set forth in *Cromwell* v. *County of Sac,* 94 U. S. 351. The rule has two branches. This case is governed by the

second branch under which an adjudication is a bar only to the extent of the precise point litigated and determined, when the question comes up in a second action for a different cause of action than was involved in the first suit. *Radford* v. *Myers*, 231 U. S. 725; *United Shoe Machinery Co.* v. *United States*, 258 U. S. 451; *Myers* v. *International Co.*, 263 U. S. 64.

An interpleader action is essentially a litigation between the claimants, and they may be considered as plaintiff and defendant respectively. The assignee asserted his title under the assignment. He was, in effect, the plaintiff in that action. Petitioner in this action sets forth her right of action on the ground that the assignment was in fraud of creditors. The second action is on a different cause of action than was involved in the first suit. In that suit, petitioner's cause of action was neither litigated nor determined and the adjudication is not a bar.

The doctrine finds application in many cases, including the following in New York:

Schuylkill Fuel Corp. v. *Niebert Realty Corp.*, 250 N. Y. 304;
Wille v. *Maier*, 256 N. Y. 465;
Marine T. Corp. v. *Switzerland G. Ins. Co.*, 263 N. Y. 139;
Sielcken-Schwarz v. *American Factors*, 265 N. Y. 239.

Though defenses which could have been asserted are barred, a counterclaim or set-off is not barred because it is a separate cause of action from the plaintiff's cause of action. A counterclaim or set-off may be asserted or not at the defendant's option, and if not asserted may be made the subject of a second action and is not barred by the adjudication in the first action. Petitioner's right to relief was not a defense to the assignee's right under the

assignment. Petitioner's cause of action does not deny the assignee's title. It admits the title and seeks to have it set aside. It is a counterclaim and would be asserted as such in litigation between them.

In *Virginia-Carolina Chemical Co.* v. *Kirven*, 215 U. S. 252, a seller had recovered judgment on a note for the price of fertilizer. The buyer later sued the seller for damage to his crops caused by using the fertilizer. It was held that the prior judgment is not a bar.

> "Of course, as contended by the Chemical Company, there are some defenses which are necessarily negatived by the judgment—are presumed never to have existed. These are such as go to the validity of the plaintiff's demand in its inception or show its performance, such as is said in *Cromwell* v. *Sac County, supra*, as forgery, want of consideration or payment. But this court has pointed out a distinction between such defenses and those which though arising out of the transaction constituting plaintiff's claim, may cut it down or give rise to an antagonistic demand. Of such defenses we said, speaking through Mr. Justice Holmes in *Merchants' Heat & Light Co.* v. *Clow & Sons*, 204 U. S. 286, 290, that the right to plead them as a defense 'is of modern growth, and is merely a convenience that saves bringing another suit, not a necessity of the defense.' And showing how essentially they were independent of the plaintiff's demand, although they might be of a defense to it, it was said that when the defendant set them up he became a plaintiff in his turn and subject to a jurisdiction that he otherwise might have denied and resisted. The principle was applied to recoupment as well as to set-off proper. Even at common law, it was said (p. 289), 'since the doctrine has been

developed, a demand in recoupment is recognized as a cross demand as distinguished from a defense. Therefore, although there has been a difference of opinion as to whether a defendant by pleading it is concluded by the judgment from bringing a subsequent suit for the residue of his claim, a judgment in his favor being impossible at common law, the authorities agree that he is not concluded by the judgment if he does not plead his cross demand, and that whether he shall do so or not is left wholly to his choice'."

Virginia-Carolina Chemical Co. v. *Kirven,* 215 U. S. 252, 257, 258.

Petitioner never had or claimed to have any title or interest in the corpus of the trust property. She had merely a right of action to have the assignment set aside. The bank could have paid to the assignee in perfect safety and without an interpleader decree. The bank indeed had no right to withhold payment. Though not binding here, the New York Banking Law, Sec. 239, subdivision 5, illustrates that and provides that notice to a bank of an adverse claim to a deposit standing to the credit of another person does not require the bank to recognize the claim unless a restraining order is obtained by the adverse claimant.

If the bank had paid, it would not have affected petitioner's right as against the assignee. Instituting the interpleader action, which was unnecessary, and joining petitioner, which was likewise unnecessary inasmuch as she had no claim to nor interest in the fund, cannot affect her rights as against the assignee.

Two New York cases are closely in point. In *Jasper* v. *Rozinski,* 228 N. Y. 349, a parcel of real property had been transferred and a mortgage given back by the buyer to the seller and the mortgage was then assigned. A

creditor sued to set aside the transfer of the property and the assignment of the mortgage as a fraud on creditors. After issue was joined an action was brought to foreclose the mortgage, and the creditor was made a party defendant but failed to appear. The foreclosure went to judgment and the judgment was then set up by supplemental answer in the creditor's suit. The Court of Appeals held that it was not *res judicata* of the issues involved in the creditor's suit. The Court said,

> "We have presented to us, therefore, the simple question whether the plaintiff, a judgment creditor of Krulewitch, who duly commenced a judgment creditor's action to set aside conveyances including a mortgage and an assignment thereof, which were in fact given to hinder, delay and defraud the plaintiff in the collection of his judgment, is prevented from continuing the action to judgment, because he failed, as a defendant in the foreclosure action mentioned, to appear and affirmatively allege and establish the fraud in that action."
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> "Even if we assume that it would have been a proper issue if tendered for determination in the foreclosure action, the plaintiff's claim of fraud in the transfers as stated was neither tendered as an issue, litigated, nor in any way determined by that action. (*Merchants Bank* v. *Thomson,* 55 N. Y. 11.)"
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> "The judgment in the foreclosure action did not purport to adjudge the validity of the mortgage as against the plaintiff herein and did not estop the plaintiff from pursuing his remedy in this action. (*Valentine* v. *Richardt,* 126 N. Y. 272.) He may as against the defendant Rozinski, one of the fraudu-

> lent transferees, follow the proceeds of sale and treat the same as having taken the place of the real property on which the mortgage was an apparent but fraudulent lien."
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> Pages 356, 358, 359.

In *Slote* v. *Cascade Holding Corp.*, 276 N. Y. 239, a mortgage had been executed on realty. When it was subsequently paid the mortgagor procured its assignment to a dummy corporation. An action was later brought to foreclose the mortgage. During the pendency of that action a trustee in bankruptcy was appointed for the mortgagor and the trustee, on his own motion, was given leave to intervene. He failed to do so however. The trustee then brought an action to set aside the assignment of the mortgage. The Court held that the judgment in foreclosure was not a bar to the action and said:

> "The trustees in bankruptcy became parties to the foreclosure action though no claim was asserted there against them because they wished to assert in that action a claim to the mortgaged premises superior to the claim of the plaintiff in the foreclosure action. That claim has never been litigated; the judgment in the foreclosure action established no rights inconsistent with the assertion now of that claim, and is not an adjudication of that claim. *Schuylkill Fuel Corporation* v. *B. & C. Nieberg Realty Corporation, supra. Jasper* v. *Rozinski, supra,* presented the same problem that is here presented, and our decision there is controlling."
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> Pages 245, 246.

The Connecticut Court did not attempt to determine the issues involved in this action. It merely held that the assignee had title by assignment and so directed payment

to him. It did not determine that the title could not subsequently be set aside. It merely adjudicated

> "that the plaintiff pay and turn over and deliver said property to the defendant Harry N. Wessel and that said plaintiff thereupon be discharged of all further liability to any and all the defendants thereto and that the plaintiff be allowed his costs, etc." (R. 7, 8).

III.

The Connecticut Court did not afford petitioner an adequate opportunity of being heard.

Service of process was made on petitioner by mail in New York on August 22nd, 1944 (R. 7). That process was for the purpose of permitting her to appear in the Connecticut action. We do not complain that there was no opportunity of appearing. A claimant, however, does not have to appear if she has no desire to object to the entry of an interlocutory decree directing interpleader. After such decree has been made she may then file and prove her claim.

The interlocutory decree was made on October 16th, 1944 and a direction made that claims be filed and proved on October 20th, 1944 (R. 16). Notice of this was given to her by the Clerk of the Superior Court on October 16th, 1944 by mail. In order to prove her cause of action, depositions would have to be taken and witnesses and records from New York would be needed (R. 13, 14). The three day notice was totally insufficient.

Though the cases deal with notice of the commencement of an action, an essential part of due process is an adequate opportunity of being heard, and that was not afforded to the petitioner here.

Roller v. *Holly,* 176 U. S. 398;
Londoner v. *Denver,* 210 U. S. 373;
Twining v. *New Jersey,* 211 U. S. 78;
Honeyman v. *Hannan,* 302 U. S. 375;
Pittsburgh etc. Railway Co. v. *Backus,* 154 U. S. 421.

IV.

Respondents were estopped from contending that the Connecticut decree foreclosed the issues involved in this action.

On October 20th, 1944 petitioner's counsel appeared before the Connecticut Court and requested a continuance, or, in the alternative, that the Connecticut decree merely direct payment of the funds to the assignee and leave open the issues involved between petitioner and the assignee in the action then pending in the District Court. Respondents' counsel thereupon informed the Connecticut Court that the assignee was amply responsible (R. 13-15). The Connecticut Court on the same day made a decree directing payment of the fund to the assignee and made no adjudication with respect to the issues involved in this action (R. 7, 8). By their assurance to the Connecticut Court, which must have been intended to influence the action of the Court in denying the request for a continuance, and which apparently was in acquiescence with the request of petitioner's counsel that the issues involved in this action be left open, the respondents should be estopped from contending to the contrary.

The Circuit Court of Appeals commented on this argument to the effect that there is nothing before it to indicate that the action of petitioner was influenced by that statement made to the Connecticut Court (R. 21). It is urged, however, that a continuance might have been

granted had the statement not been made, and that the Connecticut Court denied the application for the continuance because the statement was made and because it intended to limit its adjudication. The statement of respondents' counsel to the Connecticut Court could only be relevant on the assumption that petitioner's rights would not be affected.

It is respectfully submitted that the petition should be granted.

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